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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

BRONX BRASS FOUNDRY, INC.,

Petitioner,

against

IRVING TRUST COMPANY, as Trustee in Bankruptcy of J. R. PALMENBERG'S SONS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI

To the Honorables, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully submits its petition for a writ of certiorari to review the decision of the Circuit Court of Appeals for the Second Circuit in the above case.

Summary Statement of the Matter Involved

On the 18th day of July, 1933, a petition in bankruptcy was filed in the United States District Court for the Southern District of New York against J. R. Palmenberg's Sons, Inc. (R. P. 6, fol. 17). It was thereafter adjudicated bankrupt. On the 25th day of September, 1933, your petitioner filed its proof of debt as a creditor of the bankrupt. The proof of debt was for $2,100.00 (R. P. 2), representing the balance due on an indebtedness of $3,100.00. The $1,000.00 paid on account was received by your petitioner in several payments within the proscribed four months' period (R. P. 12, fol. 36).

The trustee in bankruptcy objected to the allowance of your petitioner's claim, charging that an unlawful preference had been effected (R. P. 6). Hearings upon the issue of unlawful preference were held before a referee in bankruptcy. During the hearing, and prior to the time that the trustee completed the presentation of its evidence, your petitioner elected to withdraw its proof of debt (R. P. 79). The referee, when the application was made, gave no positive ruling (R. P. 81, fol. 242). Your petitioner refrained from further participation in the proceeding (R. P. 81, fol. 242). The referee, after concluding the hearing in the absence of your petitioner, denied the application to withdraw and held that there had been an unlawful preference. He ordered the claim expunged (R. P. 89-90).

The ruling of the referee was affirmed by the District Court (R. P. 112) without opinion and in turn the orders of the District Court and the referee were affirmed by the United States Circuit Court of Appeals for the Second Circuit.

The only evidence introduced by the trustee of the condition of the bankrupt within the four months period (March 18 to July 18, 1933) was its financial condition on April 1st, 1933 (Trustee's Ex. 4, R. P. 100). The proof consisted of an extract from the books of the bankrupt which showed assets of $127,398.12 (omitting good will), and liabilities of $283,652.75. This showed that at the time the payments were made to petitioner the debtor's (bankrupt) estate was sufficient to pay all creditors at least 45% of their claims; and if the book value of its good will were to be accepted, it was fully solvent. It thus affirmatively appeared that petitioner received less than one-third of its claim at a time when all other creditors could have been paid at least 45% of their claims. The Circuit Court of Appeals in its opinion recognized that this was so (76 Fed. [2nd] 935, at page 937).

There is no evidence in the record to show that in the bankruptcy proceedings the general creditors will receive less than one-third of their claims.

The Circuit Court of Appeals held, upon the question of the right to withdraw the proof of debt, that if leave to withdraw the claim had been granted, the trustee would have lost the right to litigate, in connection with the motion to expunge, the issue of preference, and that this right was a substantial one of which the trustee could not be deprived (Page 936). The Court also relied upon a local district rule making the dismissal of suits in equity discretionary (Page 936), and considered the proceeding in bankruptcy an equity proceeding and therefore within the operation of the rule.

In interpreting Section 60 of the Bankruptcy Act (11 U. S. C., Sec. 96), the Court below held that although the part payment was not preferential at the time it was made, nevertheless it became preferential because your petitioner might receive a dividend in the bankruptcy proceeding (Page 937).

The Questions Presented

A. Upon the matter of withdrawing the proof of debt in a bankruptcy proceeding:

1. Has a creditor an absolute right to withdraw his proof of debt, at any stage of the proceedings before decision, unless other creditors will thereby suffer legal prejudice?

2. Does the vexation of future litigation upon the same matter constitute legal prejudice?

3. Is the withdrawal of a proof of debt a matter resting within the discretion of the referee or District Court?

4. May a local District Court make a rule limiting the right to withdraw a proof of debt?

B. Upon the question of an unlawful preference where a creditor receives a partial payment:

1. Is a *part* payment of a debt made while the debtor is a going concern, preferential, if, at the time of payment, the assets of the debtor are sufficient to pay all other creditors of the same class an equal or greater percentage of their debt?

Jurisdiction

The order of the Circuit Court of Appeals for the Second Circuit, sought to be reviewed, was entered on the 22nd day of April, 1935.

The jurisdiction of this Court is invoked under Section 240a of the Judicial Code as amended by the Act of February 13, 1925 (U. S. C., Title 28, Sec. 347a).

Statute Involved

Section 60 of the Bankruptcy Act (11 U. S. C. A., §96) reads as follows:

> "(a) A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition * * * made a transfer of any of his property, and the effect of * * * transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class * * *.
>
> "(b) If a bankrupt shall have * * * made a transfer of any of his property, and if, at the time of transfer * * * and being within four months before the filing of the petition in bankruptcy * * * the

bankrupt be insolvent and the * * * transfer then operate as a preference, and the person receiving it or to be benefited thereby * * * shall then have reasonable cause to believe that the enforcement of such * * * transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person."

Opinions Below

The referee and the District Court rendered no opinions. The opinion of the Circuit Court of Appeals is reported at 76 Fed. (2nd) 935.

Reasons Relied on for Allowance of Writ

A.—The decision of the Court below is in conflict with the decisions of the Sixth and Eighth Circuit Courts of Appeals upon both main questions.

The Court below in its opinion, at page 936, expressly acknowledges this fact, citing the cases of *Scholl Mfg. Co.* v. *Rodgers,* 51 Fed. Rep. (2d) 971 (C. C. A. 8) and *Deeley* v. *Cincinnati,* 23 Fed. Rep. (2d) 920 (C. C. A. 6) holding to the contrary on the question of the right to withdraw a proof of claim; and, at page 937, the cases of *Haas* v. *Sachs,* 68 Fed. Rep. (2d) 623 (C. C. A. 8) and *Peck* v. *Whitmer,* 231 Fed. Rep. 893 (C. C. A. 8) holding to the contrary on the question of what constitutes an unlawful preference.

(1) Upon the question of withdrawing the proof of debt, the decision is in conflict with the case of *Scholl Mfg. Co. Inc.* v. *Rodgers,* 51 Fed. Rep. (2d) 971 (C. C. A. 8), wherein the identical situation was presented. In that case, at pages 973, 974, the rule on the subject of withdrawing a proof of debt in bankruptcy is stated as follows:

"That a claim filed in a bankruptcy proceeding may be withdrawn is the general rule * * *. The

exception to the general rule as to the right of a dismissal is where such dismissal or withdrawal will result in legal prejudice to the other party, which would be the situation if there were a counterclaim at issue or affirmative action sought by defendant * * *. It is to be noted in the case at bar that no affirmative relief was asked by the trustee. There was no counterclaim. The claim of appellant was objected to because goods had been returned which the trustee claimed amounted to a preference and such preference was urged as a *defense* to appellant's claim. The trial court was of the opinion that the right to have an adjudication of preference made by the referee was an affirmative right and was in the nature of affirmative relief against the claim filed.

"We are unable to agree with this theory. What the trustee loses by a withdrawal of the claim is the opportunity to have determined a question that might be of benefit to him in a suit brought to recover the alleged preference. Is this sufficient to bring this case within the exception to the general rule as to the right to dismiss? * * * A plenary suit in equity by the trustee would be necessary to recover the preference, and the referee would have no jurisdiction over such suit. * * * The referee could have decided there was a preference and hence that the claim could not be allowed, and that holding affirmed by the District Court would of course be of value as *res adjudicata* in an action to recover the preference. However, granting that such adjudication is of some value, the fact remains that the trustee was asking for no affirmative relief, and was in no position to demand such relief under the objection filed to proof of claim. The relief asked is merely the establishment of the preference as a defense to the

claim, and *we are satisfied that the mere depriving the trustee of the opportunity to have the question of preference passed on in this hearing is not the destruction of any substantial right, or sufficient to constitute legal prejudice and warrant the overruling of the petition of appellant to withdraw its claim.*" (Italics ours.)

(2) Upon the question of unlawful preference, it is in conflict with decisions of the Circuit Court of Appeals for the Eighth Circuit. That Court in the case of *Haas* v. *Sachs*, 68 Fed. Rep. (2d) 623 (C. C. A. 8), reviewed its previous decisions and stated the settled rule of that Circuit as follows, at pages 625, 626:

> "If enough assets remain after a transfer to one creditor to give other creditors in the same class as great or greater percentage of their claims, then no voidable preference results. W. S. Peck & Co. v. Whitmer (C. C. A. 8), 231 F. 893, 897; Mansfield Lumber Co. v. Sternberg (C. C. A. 8), 38 F. (2d) 614, 617.
>
> "This Court has held that whether the effect of the transfer will be to enable the creditor receiving it to obtain a greater percentage of his claim than other creditors of the same class, is to be determined as of the date of the actual transfer, and not as of some future date when later events have altered the assets or liabilities, or when court liquidation may have caused shrinkage of values and other losses * * *. It conclusively appears that, at the time appellant received the $2,000.00 payment, the bankrupt still had sufficient assets to pay to other creditors in the same class a *greater* percentage of their debts * * *. There was therefore no voidable preference, and the order appealed from is reversed * * *." (Italics ours.)

It conflicts also with the decision of Circuit Court of Appeals for the Seventh Circuit. The case of *Butler Paper Co.* v. *Goembel*, 143 Fed. Rep. 295 (C. C. A. 7) at page 297, states:

> "The valuation for the test of solvency or insolvency under the issue must relate to the conditions, as a going concern, when the alleged preference was given, and not to the mere dead matter of the plant after bankruptcy intervened • • •."

Upon both questions, therefore, the decision which is here sought to be reviewed is in conflict with other Circuits.

B.—The decision of the Court below is contrary to the decisions of this Court and of a well settled common law rule governing the right of a litigant to discontinue. The general rule on this subject is stated in *Ex Parte Skinner & Eddy Corp.*, 265 U. S. 86, and in *Pullman Palace Car Co.* v. *Central Transportation Co.*, 171 U. S. 138. The opinion of the Court below attempts (at page 936) to distinguish these two cases, but it is nevertheless plain from the opinion that it failed to distinguish these cases from the case at bar and that it clearly conflicts with the decisions of this Honorable Court. The statement to be found in the opinion is that if leave to withdraw the claim had been granted, the trustee would have lost the right to litigate, in connection with the motion to expunge, the question whether the creditor has acquired a preference (Page 936). Thus, the opinion is opposed to the general rule, as stated in the *Ex Parte Skinner & Eddy Corp.* case that the necessity for future litigation of the same kind is not *"legal"* prejudice which would render the allowance of discontinuance a matter of discretion rather than absolute right. We quote from *Ex Parte Skinner & Eddy*, 265 U. S. 86, at pages 92 and 93:

> "At common law a plaintiff has an absolute right to discontinue or dismiss his suit *at any stage of the*

proceedings prior to verdict or judgment, and this right has been declared to be substantial • • •. It is ordinarily the undisputed right of a plaintiff to dismiss a bill in equity before final hearing • • •. In Pullman Palace Car Co. v. Central Transportation Co., 171 U. S. 138, 146, this statement of the rule in City of Detroit v. Detroit City Ry. Co., 55 Fed. 569, was approved:

> 'It is very clear from an examination of the authorities, English and American, that the right of a complainant to dismiss his bill without prejudice, on payment of costs, was of course except in certain cases (Chicago & A. R. Co. v. Union Rolling Mill Co., 109 U. S. 702). The exception was where a dismissal of the bill would prejudice the defendants *in some other way than by the mere prospect of being harassed and vexed by future litigation of the same kind.*'

"• • • The right to dismiss, if it exists, is absolute. It does not depend on the reasons which the plaintiff offers for his action. The fact that he may not have disclosed all his reasons or may not have given the real one cannot affect his right." (Italics ours.)

C.—The Court below has decided an important question of general law in a manner which is untenable and in conflict with the weight of authority. The conditions under which a litigant may discontinue his action, or in this case, his proof of debt, are well settled, and the authorities, to which the decision of the Court below is opposed, are referred to in its opinion (Page 936) and have been already sufficiently pointed out in this petition.

D.—The decision of the lower Court gives sanction to a rule of the District Court, upon the subject of discontinu-

ances, which is beyond the rule-making powers of the District Court, and is contrary to the law as laid down by this Honorable Court. In the case of *Ex Parte Skinner & Eddy Corp.*, 265 U. S. 86, the right to discontinue a suit is declared to be a substantial right. The opinion of the lower Court considers the matter a procedural one, and thus within the province of a District Court to regulate by rules. The effect of the lower Court's decision is, therefore, to render ineffectual the decision of this Honorable Court.

E.—The construction of Section 60 of the Bankruptcy Law, an important Federal statute, is involved in this case. The problem of determining preferences as defined by that statute is an ever-recurring one.

This Honorable Court has never construed that statute.

We have shown that there is disagreement among the Circuits as to the construction thereof. The interpretation by the Court below is strained and violative of its plain language. The Court below holds that though a part payment when made is not *then* preferential in fact, it nevertheless becomes preferential if the creditor may receive a dividend in a possible future bankruptcy proceeding. This obviously disregards the language of subdivision (b) of Section 60, which, in defining a voidable preference makes the test of preference, not what might happen in the future and as a result of uncertain events which may never occur, but the effect at the time of the transfer and the knowledge of the creditor of such effect at such time. This statute contains the phrases "*then* operate as a preference" and "*then* have reasonable cause to believe" (Section 60b). The opinion of the Court below holds in effect that if a creditor who at the time of transfer has received only his proportionate share of the assets does *not* file a proof of debt in the event of future bankruptcy, he has not received a preference; but if he does file his proof of debt and may receive a dividend therein which will give him more than

his proportionate share (although this fact may be unknown until the very time that the dividend is ready for payment) he has received a preference; and, even if he files a proof of debt but there be no assets in the estate he has not received a preference.

Thus, under this interpretation, the expenses of administration may be the controlling factor in the determination of the question as to whether an unlawful preference had been effected in a transaction taking place months prior to bankruptcy, because, in many cases, the expenses of administration leaves nothing for distribution to creditors.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that Court to certify to and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 330, In the Matter of Bronx Brass Foundry, Inc., Appellant, against Irving Trust Co., Appellee, and that the said order of the said Circuit Court of Appeals for the Second Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your petitioner will ever pray.

BRONX BRASS FOUNDRY, INC.,
Petitioner,

By MAXWELL H. GOLDSTEIN,
Counsel for Petitioner.